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No. 91-1209

In The

Supreme Court of the United States

October Term, 1991

NORTHERN ARAPAHO AND SHOSHONE INDIAN TRIBES OF THE WIND RIVER INDIAN RESERVATION,

Petitioners,

v.

OLIVER J. FOUST

and

MANUEL LUJAN, JR.,
Secretary of the Interior,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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The Response Briefs filed by Oliver J. Foust ("Foust") and Manual J. Lujan, Jr., Secretary of the Interior ("Secretary") assert that two issues raised in the Northern Arapaho and Shoshone Indian Tribes' ("Tribes") Petition for Writ of Certiorari were not raised before or addressed by the United States Court of Appeals for the Tenth Circuit. Foust and the Secretary claim that the decision of the Court of Appeals does not decide whether lands unavailable for homesteading when entered may be conveyed to a homesteader pursuant to a patent correction, or whether, through a patent correction, an entryman may acquire title to land owned by an Indian Tribe.

See Foust's Brief at 13-14; Secretary's Brief at 9-10. This Court may decline to address issues that were not raised below or squarely considered by the Court of Appeals. *See Robertson v. Seattle Audubon Society*, Case No. 90-1596, 1992 W.L. 54323 at 7 (U.S. March 25, 1992); *Youakim v. Miller*, 425 U.S. 231, 234 (1975); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Duignan v. United States*, 274 U.S. 195, 200 (1957). However, where, as here, the issues were squarely addressed by the Court of Appeals, they are properly included in the Tribes' Petition and may be addressed by this Court. Moreover, the writ of certiorari exists precisely so that this Court can address issues that the Court of Appeals decided in a manner that conflicts with prior decisions of this Court and lower courts and which are, as the Secretary notes, unsupported by the evidence. *See* Secretary's Brief at 7, 11.

ARGUMENT

Foust and the Secretary have failed to review closely the Court of Appeals' opinion. The issues they claim were not raised before or addressed by the Tenth Circuit are explicitly addressed in section I of the court's opinion. *See Foust v. Lujan*, 942 F.2d 712 (10th Cir. 1991), reproduced in the Appendix to the Petition for Writ of Certiorari and hereafter referred to as "App. at ___".

The Federal Land Policy and Management Act's ("FLPMA") patent correction provision, 43 U.S.C. § 1746, only applies to "public land". *See* 43 U.S.C. § 1702(e). The Tenth Circuit initially considered whether the SW¼NE¼ of Section 28 was public land and, therefore, subject to FLPMA's patent correction provision. App. at 4a. In determining that issue, the court found that the relevant period of inquiry was the time at which the patents were issued – in this instance 1936. App. at 6a.

The issue of whether the land in question was public land subject to FLPMA's patent correction provision was presented, argued and determined before the Interior Board of Land Appeals ("IBLA"), the United States District Court for

the District of Wyoming ("District Court") and the Court of Appeals. Contrary to Foust's assertion, Foust's Brief at 13, the IBLA and the District Court

> found that § 1746 *does not allow what Foust proposes*, because the SW¼NE¼ had been withdrawn from homestead entry for the purpose of a power reserve at the time the patents were issued.

App. at 5a (emphasis added).

This finding, not that proffered by Foust, was supported by the Tribes at every stage of this litigation. The Tenth Circuit, however, disagreed with the Tribes and the interpretation of the administrative agency authorized to implement the statute and held that

> [a] finding that the Secretary . . . cannot correct a patent to include lands that were not subject to entry by the original patentee is not in accordance with the law.

App. at 6a.

Whether § 1746 applies to land that was not available for entry was squarely addressed by the Tenth Circuit. As set out in the Tribes' Petition at 12-19, the Tenth Circuit's decision to disregard the withdrawn status of the land in question is contrary to this Court's longstanding refusal to recognize any legal or equitable interest in an entryman who settles on public land that is not open to homestead. The issue is properly included in the Tribes' Petition and the writ of certiorari should issue so that this Court can address the Tenth Circuit's deviation from established principles of public land law.

As part of its determination of whether the land in question was public land at the time the patents issued, the Court of Appeals was obliged to consider the Tribes' ownership interest in the land in 1936. App. at 5a-6a. While the Tenth Circuit failed to provide any analysis, it did not fail to decide the issue. The court found:

> We are . . . unpersuaded by the Indians' argument that the Secretary cannot correct a patent when doing so would require conveyance of tribal land. We agree that the lands now held by the United

> States in trust for Indians are not public lands. *See* 43 U.S.C. § 1702(e). The relevant inquiry, however, is whether the lands in question were public lands at the time the patent was issued. The lot in question here, the SW¼NE¼, was owned by the United States, administered by the Secretary, *and not held in trust for the Indians in 1936,* and it therefore was public land under the statutory definition.

App. at 6a (emphasis added). The court very clearly recognized that the Tribes has raised the issue of the status of the land in question and just as clearly determined that the land was public land *because it was not held in trust for the Tribes.* (The issue, and the applicability of *Ash Sheep Co. v. United States,* 252 U.S. 159 (1920), was discussed by the Tribes' counsel at oral argument.) Yet, the Secretary inexplicably contends that the issue was not considered by the Court of Appeals. Secretary's Brief at 9-10.

The Tenth Circuit's decision to disregard the Tribes' interest in the land in 1936 is an essential underpinning of the court's holding; namely, that the patent correction provisions of FLPMA applied in this instance because the land was "public land", and not "Indian land". As the Tribes argue in their Petition at 21-24, the court's failure to recognize the Tribes' interest is in direct conflict with this Court's recognition that, where a tribe conditionally cedes land, the land does not become public land until the tribe receives full compensation. *Ash Sheep,* 252 U.S. at 162. That issue was properly presented in the Tribes' Petition.

Ash Sheep has never been interpreted as narrowly as the Secretary suggests. Secretary's Brief at 9-10. *See, e.g., Solem v. South Dakota State Penitentiary,* 465 U.S. 463, 468 (1984); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 601 n. 24 (1977); *State of Idaho v. Andrus,* 720 F.2d 1461, 1465-67 (9th Cir. 1983); *United States v. Consolidated Mines & Smelting Co.,* 455 F.2d 432, 437 (9th Cir. 1971); *Hansen v. United States,* 153 F.2d 162, 163 (10th Cir. 1946); *Red Lake Band of Chippewas v. City of Baudette,* 730 F.Supp. 972, 974-75 (D.Minn 1990); *Ute Indian Tribe v. Utah,* 521 F.Supp. 1072, 1099-1100 (D.Utah 1981). Moreover, the impacts flowing from the

Tribes' interpretation does not lead to the harsh result suggested by the Secretary. Secretary's Brief at 10. If Foust had taken the steps any reasonable purchaser of real property takes prior to concluding a sale, including arranging for a survey, he would have discovered that the buildings he thought he was purchasing were not located on the land he was, in fact, purchasing.

As the Secretary notes at page 9 of his brief, the application of *Ash Sheep* to this case presents a "nice question" for this Court's consideration. Because essential rights of the Tribes are at stake and because the Tenth Circuit's decision in this case conflicts with this Court's and lower courts' application of *Ash Sheep*, the time for deciding that "nice question" is now.

CONCLUSION

The legal issues raised in the Tribes' Petition for Writ of Certiorari were raised and addressed by the Court of Appeals and are properly before this Court. For all these reasons and for the reasons stated in the Petition, the writ of certiorari should be issued.

Respectfully submitted,

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